Expatriate Coverage under Health Care Reform

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This Note identifies commonly-encountered issues involving expatriates under health care reform (the Patient Protection and Affordable Care Act (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010 (HCERA)), including whether an expatriate continues to be subject to health care reform while working outside the United States. The Note addresses the guidance issued to date on this topic.

The Patient Protection and Affordable Care Act (PPACA) was enacted on March 23, 2010 and amended by the Health Care and Education Reconciliation Act (HCERA) on March 30, 2010. Collectively, PPACA and HCERA are referred to as health care reform (see Practice Note, Health Care Reform Overview (http://us.practicallaw.com/7-502-3192)).

Although many aspects of health care reform are coming into focus, the law's implications for companies with expatriate employees remain largely unclear. Since the enactment of health care reform, the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury (collectively, the Departments), which are charged with implementing health care reform, have issued regulations, rules and guidance interpreting the law. However, guidance on health care reform's application to expatriate employees is limited. In all likelihood, many aspects of health care reform's international impact were not considered in enacting the law.

This Practice Note highlights some of the commonly-encountered issues involving expatriates under health care reform. The issue of principal concern is whether an expatriate continues to be subject to health care reform while working outside the US. There are potential employee and employer penalties if health care reform's requirements are not followed (see Practice Notes, Health Insurance Exchanges and Related Requirements under Health Care Reform (http://us.practicallaw.com/4-507-2259) and Employer Mandate under Health Care Reform: Overview (http://us.practicallaw.com/0-523-4715)). Another key issue is whether foreign nationals sent to work in the US are subject to health care reform's requirements.

Although the Departments have issued some guidance in this area (including an expatriate health plan FAQ and a summary of benefits and coverage (SBC) compliance FAQ), it is not enough to allow companies to fully address their obligations under health care reform when they send employees on international assignment. The silver lining to this lack of guidance is the potential opportunity to submit comments to the Departments that:

- Suggest what outcomes would be most desirable from a policy standpoint.
- Provide certainty to expatriates and their employers, before 2014, when health care reform's health insurance exchanges begin operation.

HEALTH CARE REFORM COVERAGE REQUIREMENTS

Beginning in 2014, health care reform requires applicable individuals to maintain health coverage, referred to as minimum essential coverage (MEC), for themselves and their dependents each month, or face penalties (IRC § 5000A(a)). There are certain exceptions to this requirement, referred to as the individual mandate, including for individuals:

- Who cannot afford coverage.
- With income below a certain threshold.
- With certain defined hardships.
  (IRC § 5000A(e).)

The penalty imposed for an individual's failure to obtain MEC is paid with the individual's federal income tax return for the year that includes the month of the failure (IRC § 5000A(b)(2)).

Despite the meaning suggested by the term, MEC refers to the vehicle under which coverage is provided and has little to do with the level of benefits provided under a health plan. Health care reform defines MEC to mean coverage under any of the following programs:

- Certain government-sponsored programs (for example, Medicare coverage).
Eligible employer-sponsored plans.
A health plan offered in the individual market within a state.
Grandfathered group health plans (see Practice Note, Grandfathered Health Plans under Health Care Reform (http://us.practicallaw.com/5-506-1552)).
Other coverage recognized by regulation.
(IRC § 5000A(f)(1)).

For these purposes, an eligible employer-sponsored plan includes:

- Certain governmental plans.
- Any other plan or coverage offered in the small or large group market within a state.
(IRC § 5000A(f)(2)).

Health care reform also requires many employers to provide health coverage to their employees, or face penalties, known as the “pay or play” rules (see Practice Notes, Employer Mandate under Health Care Reform: Overview (http://us.practicallaw.com/0-523-4715) and Employer Mandate under Health Care Reform: Determining Full-time Employees for Employer Penalties (http://us.practicallaw.com/9-524-2565)). In fact, health care reform does not create a mandate for employers at all, but imposes a penalty if both:

- An applicable large employer fails to offer MEC to its full-time employees (and their dependents).
- A full-time employee of the employer obtains coverage through a state-sponsored exchange and receives a federal subsidy for health coverage.
(IRC § 4980H(a)(1)).

An applicable large employer means an employer with an average of 50 or more full-time employees during the calendar year (or the equivalent combination of full-time and part-time employees) (IRC § 4980H(c)(2)).

The controlled group rules apply in determining who is an “applicable large employer” (IRC § 4980H(c)(2)(C) and see Practice Note, Controlled Group and Affiliated Service Group Rules (http://us.practicallaw.com/3-522-4866)). A small US company that is part of a larger controlled group of companies (including non-US companies) may therefore be considered an “applicable large employer” under health care reform. However, only work performed in the US is considered in determining whether a company has at least 50 full-time employees. For example, if a foreign employer has a large workforce worldwide, but less than 50 full-time (or equivalent) employees in the US, the foreign employer generally would not be subject to health care reform’s employer penalties.

**DETERMINING WHO IS THE EMPLOYER**

Health care reform’s implications for expatriates may vary depending on who is the expatriate’s real employer. Specifically, the question is whether the expatriate is employed during the term of the international assignment by either a:

- US employer.
- Non-US company.

Internal Revenue Service (IRS) proposed regulations define “employer” as the entity that is an employee’s employer under the US common-law standard (Prop. Treas. Reg. § 54.4980H-1(a) (14)). That standard provides that the employer-employee relationship generally exists when the person for whom services are performed has the right to control and direct the individual who performs the services, including both:

- The result to be accomplished by the work.
- The details and means by which that result is accomplished (Treas. Reg. § 31.3121(d)-(c)(2) and see Practice Note, Independent Contractor Classification (http://us.practicallaw.com/4-503-3970)).

This is a question of fact that must be asked in every case. Typically, the employer will be the same person or entity who is referred to in the employment agreement or the expatriate’s international assignment letter (see Standard Document, Expatriate Secondment Letter of Assignment (http://us.practicallaw.com/4-525-9389)). However, a more focused and nuanced determination may be required if an expatriate is sent by one company to provide services for another company.

**Example: Determining the Employer**

An expatriate is seconded to work in Israel for the Israeli affiliate of a US company. The expatriate serves as general counsel of the Middle Eastern region, reporting to both:

- The president of the Israeli affiliate.
- The general counsel in the US (his boss).

The expatriate will be assigned for two years, after which it is expected that he will return to the US. The assignment letter indicates that the expatriate will remain an employee of the US company while working in Israel.

Although the documentation in this case indicates that the expatriate is an employee, the question of fact is whether the Israeli affiliate has the right to direct and control the individual’s activities, in which case he might be deemed to be an employee of the Israeli affiliate, not the US company.

**EXPATRIATES EMPLOYED BY A US COMPANY BUT SENT ON ASSIGNMENT TO WORK ABROAD**

Subject to an exemption, the individual mandate likely applies to expatriates who are employed by a US company but sent on assignment to work abroad. Because the individual mandate applies to “applicable individuals,” it must first be determined if the expatriate is an applicable individual under health care reform. The phrase “applicable individual” is defined in terms of what it does not include. Specifically, the definition excludes an individual who is not a citizen or national of the US or an alien lawfully present in the US (IRC § 5000A(d)). This suggests that any US citizen or US national is always subject to the individual mandate, even if working outside the US.
Many multinational companies with large expatriate populations maintain a separate group health plan primarily for expatriates and their dependents so that when:

- The individual goes on assignment, coverage typically is moved to the special expatriate group health plan.
- The assignment is over, the expatriate’s health coverage is moved back to the plan covering where he is working at that time.

An insured expatriate group health plan is likely MEC, so the individual mandate will be met for each month the expatriate is covered by this type of plan while working outside the US (see DOL: FAQs About Affordable Care Act Implementation (Part XIII) and see Avoiding the MEC Penalty by Acquiring Other Health Plan Coverage through an Exchange). However, where the expatriate’s employer does not offer such a plan to its expatriates, an expatriate is potentially liable for violating the individual mandate.

In addition, an applicable individual is treated as having MEC for purposes of health care reform for any month during which either:

- The individual’s foreign residency or physical presence in a foreign country or countries qualifies him for the foreign earned income exclusion.
- The individual is a bona fide resident of any US possession for that month. (IRC § 5000A(f)(4).)

An individual qualifies for the foreign earned income exclusion for a year if the individual has a tax home in a foreign country and meets one of two tests:

- The individual is a US citizen who establishes that he was a bona fide resident of a foreign country or countries for an uninterrupted period which includes the entire taxable year.
- The individual is a US citizen or resident who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period. (IRC § 911(d)(1).)

Many multinational companies are aware of the foreign earned income exclusion and how it applies to expatriates, particularly if the company:

- Has a tax equalization or tax protection program for its expatriates.
- Provides expatriates with tax preparation assistance while on assignment.

A complicating factor is that expatriates sent on international assignment do not typically qualify for the foreign earned income exclusion right away. Particularly if the expatriate will qualify for this exclusion by reference to the 330-day physical presence test, it will likely be a number of months before it is certain the expatriate qualifies. Because compliance with the individual mandate is determined on a monthly basis, there is a potential gap period during which the expatriate may not yet have qualified for the foreign earned income exclusion and therefore does not meet the statutory exemption from the individual mandate for that month. Companies and expatriates need to be aware of this potential gap period and should plan accordingly.

**Example: Temporary Foreign Assignments**

A software engineer is:

- Employed by a US data management software company.
- Sent to Singapore for two years beginning January 1 to help the local affiliate with its client applications in the Asia-Pacific region.

While on assignment, the expatriate will no longer be covered by the US health plan, and the employer does not have a special expatriate group health plan. During the first year, while the expatriate does not yet qualify for the foreign earned income exclusion, he could be subject to an individual mandate penalty for those months in which he has no US plan coverage.

**Possible Impact of Short Coverage Gap Exception**

An additional exception from the individual mandate penalty is available if the period without coverage is less than three months (with only one period of three months allowed in one year) (IRC § 5000A(e)(4)(A)). However, it is unclear how this exception would work where:

- There are multiple periods of noncoverage.
- One period of noncoverage is less than three months and straddles more than one calendar year.

Once the period of noncoverage exceeds three months, the individual mandate would apply to the software engineer (expatriate) in this case.

**Possible Impact of Foreign Earned Income Exclusion**

Because the individual mandate penalty is not due until the expatriate files his federal income tax return, the expatriate could be tempted not to pay the penalty at all, because by then he has qualified for the foreign earned income exclusion. In principle this could cover the entire period that the expatriate was outside the US. However, there is no guidance to suggest that the expatriate’s subsequent qualification for the foreign earned income exclusion can “erase” his prior noncompliance with the individual mandate.

Alternatively, it would be helpful for the Departments to issue a new rule under which any penalties for violating the individual mandate are not assessed if the expatriate subsequently qualifies for the foreign earned income exclusion for the year in which there is any gap period with no MEC. If the government is not anticipating the payment of the penalty tax until the federal income tax return is filed, it would make sense not to impose the penalty for violating the individual mandate if the expatriate can show by the time the return is filed that he has met the qualification test for the foreign earned income exclusion retroactively. Until more guidance is provided, this remains an unsettled area.
AVOIDING THE MEC PENALTY BY ACQUIRING OTHER HEALTH PLAN COVERAGE THROUGH AN EXCHANGE

Many US expatriates do not qualify for the foreign earned income exclusion under IRC Section 911. For example, short-term international assignments might not be long enough for the individual to qualify for the exclusion. An expatriate in this situation needs an alternative approach for obtaining MEC.

Normally under health care reform (outside the expatriate context), an individual for whom employer plan coverage is unavailable could consider acquiring health coverage under health care reform’s state-based health insurance exchanges, which begin operation in 2014. However, only qualified individuals may purchase health coverage through an exchange. For these purposes, a qualified individual is an individual who:

- Seeks to enroll in a qualified health plan in the individual market offered through the exchange.
- Resides in the state that established the exchange.
- Is a US citizen or national or an alien lawfully present in the US.

(42 U.S.C. §§ 18032(f)(1)(A)(ii) and (f)(3).)

It is unclear whether the software engineer in the Example: Temporary Foreign Assignments would be viewed as residing in a state while on assignment to Singapore for two years. Although the natural conclusion is that the individual is probably not residing in a state, there is not yet guidance on what it means to be residing in a state for these purposes. For example, it is unknown whether residence requires physical presence in the state. As a result, it is unclear whether the software engineer could avoid the penalty for failing to have MEC while on foreign assignment by purchasing insurance through an exchange.

For a short-term assignment, and assuming physical presence is not required, if the expatriate had state residence before he leaves on the international assignment, then it would appear that such status would continue while the expatriate is working out of the country. Additional guidance for making this determination would be helpful.

AVOIDING THE MEC PENALTY IF HEALTH PLAN COVERAGE IS OFFERED BY A NON-US COMPANY

Some companies have considered whether a US expatriate could avoid the penalty for failing to have MEC if he is covered by a health plan offered by a non-US company. However, the narrow definition of MEC does not seem to include a health plan or insurance coverage offered by a non-US company. In particular, the definition of “eligible employer-sponsored plan” includes a plan or coverage offered in the small or large group market within a state. Accordingly, a health plan sponsored by a non-US company is unlikely to meet this definition. However, under HHS proposed regulations, a foreign national who is working in the US and covered by a health plan offered by his country of citizenship may be deemed to have MEC (see Individual Mandate and Foreign Nationals Employed by Non-US Companies Sent to Work in the US).

EMPLOYER PENALTIES APPLICABLE TO A US EMPLOYER OF AN EXPATRIATE SENT TO WORK ABROAD WHO IS NOT OFFERED MEC

It is possible that the employer penalties apply to a US employer of an expatriate who is sent on assignment to work abroad but who is not offered MEC. There are two different penalties that may apply to an employer who violates the provisions of health care reform:

- An employer who fails to offer MEC to full-time employees is subject to a potential penalty of 1/12 of $2,000 per month per full-time employee if any one employee enrolls in coverage through an exchange and receives a premium tax credit or cost-sharing reduction (IRC § 4980H(a)).
- An employer who offers MEC to full-time employees is subject to a potential penalty of 1/12 of $3,000 per month per full-time employee who actually enrolls in coverage through an exchange and receives a premium tax credit or cost-sharing reduction (IRC § 4980H(b)).

Because the first penalty is potentially the larger penalty for any employer, the question is whether the employer’s failure to offer MEC to an expatriate employee (or group of expatriate employees) is sufficient to trigger this penalty, assuming that another employee of the employer enrolls in coverage through an exchange and receives a premium tax credit or cost-sharing reduction. In other words, are expatriates counted as “full-time employees” for purposes of this employer penalty?

Under IRS proposed regulations, the determination of full-time employee status is based on the following:

Under IRS proposed regulations, the determination of full-time employee status is based on the following:

- Actual hours worked.
- A days-worked equivalency (eight hours credited for each day worked).
- A weeks-worked equivalency (40 hours credited for each week worked).

(Prop. Treas. Reg. § 54.4980H-3(b)(2).)

However, the proposed regulations do not require that 100% of the employer’s full-time employees be offered MEC in order to avoid the penalties. Instead, an employer will be treated as offering coverage to its full-time employees if it offers coverage to either:

- All but 5% of its employees.
- If greater, five of its full-time employees.

(Prop. Treas. Reg. § 54.4980H-4(a)).
Therefore, depending on the number of expatriates the US company has working outside the US, expressed as a percentage of all employees who must be counted for these purposes, the penalties for failure to offer MEC may not even apply to the employer.

**Example: Exemptions from MEC Requirement**

A US company has:
- 100 full-time employees who work in the US.
- Five full-time employees who are expatriates and work outside the US.

If the US company fails to offer MEC to all of its expatriates, but offers MEC to all 100 of its other full-time employees, it will not be subject to the employer penalties under health care reform for failure to offer MEC because it offers coverage to all but five percent or, if greater, five of its full-time employees.

**Example: 50-employee Threshold for Determining an Applicable Large Employer**

A US company has 50 full-time employees:
- 45 who work in the US.
- Five who are expatriates and work outside the US.

The five expatriates are deemed to have foreign source income and therefore they will not have “hours of service” and will not count as “full-time employees”. Accordingly, the US company will not be deemed to be an “applicable large employer” because it is under the 50-employee threshold, and therefore will not be subject to the employer penalties for failure to offer MEC.

However, if the expatriate returns to the US from time-to-time during his international assignment, a portion of his compensation will be deemed to be US source income (IRC § 861(a)(3)). In that case, it is possible that the expatriate employee would be counted as a “full-time employee” for purposes of determining whether the employer has failed to offer MEC. While it is unclear from the proposed regulations, someone who is ostensibly an expatriate but returns to the US from time-to-time during the assignment might be counted as a full-time employee.

The requirement addressed here is for the employer to “offer” MEC to avoid the penalty. It does not require that the employee “accept” the MEC. It is unclear whether a company would avoid these penalties if it offered MEC to the expatriate, knowing the expatriate would not accept it.

**Hours of Service and Foreign Source Income**

In addition, hours of service are not counted if the compensation for those hours of service constitutes foreign source income under US federal income tax rules (Prop. Treas. Reg. § 54.4980H-1(a) (21)(iii)). In general, an individual’s compensation is deemed to be foreign source if it is paid for services performed by the individual while working outside the US (IRC § 862(a)(3)).

Thus, an employee working exclusively outside the US will not:
- Have hours of service.
- Count as a “full-time employee” for calculating potential employer penalties under health care reform.

Because the foreign source income rules do not have the same qualification criteria as the foreign earned income exclusion (see Individual Mandate and Expatriates Employed by a US Company But Sent on Assignment to Work Abroad), there should be no “gap” issue regarding the individual mandate.

**Example: Foreign Source Income**

A US expatriate is sent to Turkey to serve as general manager of a business there. The individual will work full-time in Istanbul while on assignment. All of the individual’s hours of service under IRC § 4980H will be excluded because all of his compensation is deemed to be foreign source income.

**EMPLOYER PENALTIES AND SPECIAL EXPATRIATE GROUP HEALTH PLAN COVERAGE WHILE ON ASSIGNMENT**

It is possible that the employer penalties apply to an employer that offers an expatriate coverage under a special expatriate group health plan while the expatriate is on assignment. In DOL: FAQs About Affordable Care Act Implementation (Part XIII) (March 2013) addressing expatriate group health plans, the Departments acknowledged that expatriate health plans face special challenges in complying with certain health care reform provisions. For example, the Departments noted that:

- Independent review organizations may not exist abroad (see Practice Note, External Review under Health Care Reform (http://us.practicallaw.com/5-506-9572)).
- It may be difficult for certain preventive services to be provided, or identified as preventive, when those services are provided outside the US by clinical providers using different code sets and medical terminology to identify services (see Practice Note, Coverage of Preventive Health Services under Health Care Reform (http://us.practicallaw.com/6-506-3287)).
- Expatriate insurers may face difficulties in:
  - communicating with enrollees living abroad; and
  - producing standardized benefits disclosures, given the complexity of expatriate plans (see Practice Note, Summaries of Benefits and Coverage under Health Care Reform (http://us.practicallaw.com/6-506-3287)).
- Expatriate plans may need additional regulatory approval from foreign governments, and may face conflicting US and foreign law requirements.

Accordingly, the Departments provided temporary transitional relief from health care reform’s requirements for expatriate group health plans for plan years ending before January 1, 2016. These plans will be deemed to comply with health care reform during the transition relief period if they comply with the pre-health care reform version of certain applicable law (for example, the Public Health Service Act, IRC and ERISA), including:
- Mental health parity provisions.
- HIPAA nondiscrimination provisions.
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- ERISA’s claims procedure requirements (see Checklist, Claims Procedure Requirements for Group Health Plans Checklist (http://us.practicallaw.com/7-506-1834)).
- Reporting and disclosure obligations under ERISA Part I (see Practice Note, Title I of the Employee Retirement Income Security Act (ERISA): Overview (http://us.practicallaw.com/8-506-7350)).

Not all expatriate group health plans may qualify for this temporary transitional relief.

According to implementation FAQs, an expatriate health plan for these purposes is an insured group health plan with respect to which enrollment is limited to primary insureds who reside outside their home country for at least six months of the plan year and any covered dependents, and the plan’s associated group health insurance coverage. This definition excludes:

- Self-insured expatriate health plans.
- Insured plans that do not limit their enrollment primarily to individuals who reside outside their home country for at least six months.

INDIVIDUAL MANDATE AND AN EXPATRIATE EMPLOYED BY A NON-US COMPANY WHILE WORKING OUTSIDE THE US

The individual mandate applies to expatriates who are employed by a non-US Company while working outside the US. For purposes of the individual mandate, it does not matter if the employer is a US employer or a non-US employer. The same rules and potential exclusions apply.

NON-US EMPLOYER OF AN EXPATRIATE SENT TO WORK ABROAD AND WHO IS NOT OFFERED MEC

The employer penalties may apply to a non-US employer (as opposed to a US employer) of an expatriate who is:

- Sent on assignment to work abroad.
- Not offered MEC.

However, if the non-US employer is not a US taxpayer and does not otherwise file a return in the US, it is questionable whether the non-US employer should be liable for failing to provide MEC to expatriate employees.

FOREIGN NATIONALS EMPLOYED BY NON-US COMPANIES SENT TO WORK IN THE US

This subsection addresses whether the individual mandate applies to a foreign national who is:

- Employed by a non-US company.
- Sent on assignment to work in the US.

The phrase “applicable individual” under health care reform is defined in terms of what it does not include (see Employer Penalties and US Employer of an Expatriate Sent to Work Abroad Who is not Offered MEC). Specifically, it does not include an individual who is not either:

- A US citizen or national.
- An alien lawfully present in the US.

(IRC § 5000A(d)(3)).

Therefore, the determination of “applicable individual” status for a foreign national working in the US focuses initially on lawful presence. A foreign national need only be lawfully present in the US to be subject to the individual mandate.

However, there are several potential exemptions that may be helpful to the foreign national. For example, the IRS has proposed that if a foreign national is a nonresident alien for an entire year, then the foreign national will be exempt from the requirement to have MEC for any month in that year (Prop. Treas. Reg. § 1.5000A-3(c)(2)(A)). For these purposes, an individual is a “nonresident alien” if he:

- Is not a US citizen.
- Does not meet any of the following tests:
  - the individual is physically present in the US for at least 31 days during the calendar year and for at least 183 days over the prior two calendar years as determined under a mathematical formula;
  - the individual is a lawful permanent US resident (for example, a green card holder); or
  - the individual elects to be treated as a resident alien for US federal income tax purposes.

(IRC § 7701(b)(1)(B)).

The proposed exemption for a nonresident alien applies only if the individual has that status for the entire taxable year. As a result, the exemption is unavailable to a foreign national for any month in a year if the foreign national:

- Comes to work in the US.
- Stays long enough in one year to become a resident alien (for example, because he is physically present in the US for at least 183 days under the “substantial presence” test).

Further, under HHS proposed regulations, a foreign national residing in the US and receiving health coverage provided by his country of citizenship, will be deemed to have MEC. This provision:

- Applies to health coverage provided by a country (for example, a national health system).
- Does not expressly include an employer-provided health plan.

Also, the proposed regulations refer to health coverage of the individual’s “home country,” which the preamble to the proposed regulations describes as the individual’s “country of citizenship”.

No penalty is assessed for failing to obtain coverage under the individual mandate if the period without coverage is less than three months (with only one period of three months allowed in one year) (IRC § 5000A(e)(4)(A)). It is unclear how this exception works where there are multiple periods of noncoverage, one of which is less than three months and straddles more than one calendar year.
As a result, there are several possible exemptions that may help foreign nationals working in the US avoid the individual mandate penalty for failing to have MEC. Foreign nationals who are sent to work in the US on short term assignments and can maintain nonresident alien status while working in the US would benefit greatly from the proposed exemption. However, foreign nationals are likely to become subject to MEC if they:

- Are assigned to work in the US for more than six months.
- Do not remain subject to health coverage provided by their home country or country of citizenship.

**NON-US COMPANY THAT SENDS A FOREIGN NATIONAL TO WORK IN THE US WHO IS NOT OFFERED MEC**

This subsection addresses whether the employer penalties apply to a non-US company that sends a foreign national to work in the US and the individual is not offered MEC. The employer mandate penalties for failing to offer MEC are triggered only when an employee:

- Enrolls in coverage through an exchange.
- Receives a premium tax credit or cost-sharing reduction.

Therefore, if the foreign national does not attempt to obtain coverage through an exchange (because he is already covered by his home country employer’s health plan), the employer mandate penalty is unlikely to be triggered. This assumes the foreign national could even get coverage through an exchange (which seems likely, but is unclear).

The issue is whether the foreign national is considered an “employee” of either:

- The home country employer.
- The US company to which he is providing services (in which case the US company may be liable for any employer penalties).

According to IRS proposed regulations implementing IRC Section 4980H, the determination of who is the “employer” should take into account whether the person for whom services are performed has the right to control and direct the individual who performs the services, both as to:

- The result to be accomplished by the work.
- The details and means by which that result is accomplished.

**ADDITIONAL ISSUES**

The individual mandate also applies to a foreign national employed by a US company while working in the US. The individual mandate applies in this case:

- Subject to several exceptions (see Individual Mandate and Foreign National Employed by Non-US Companies Sent to Work in the US).
- If the foreign national is an “applicable individual” (for example, lawfully present in the US).
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For the links to the documents referenced in this note, please visit our online version at http://us.practicallaw.com/1-528-5752

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